

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 18

Docket No. SF-4324-09-0759-I-1

**Jamie B. Swidecki,
Appellant,**

v.

**Department of Commerce,
Agency.**

January 25, 2010

Jamie B. Swidecki, Bakersfield, California, pro se.

E. Rebecca Ballard, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) for lack of jurisdiction. For the reasons discussed below, we GRANT the PFR under [5 C.F.R. § 1201.115](#)(d), REVERSE the ID, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal in which he alleged that the agency violated his rights under USERRA. Initial Appeal File (IAF), Tab 1. The administrative judge (AJ) informed the appellant of the standard for proving jurisdiction in his case and ordered him to prove jurisdiction. *Id.*, Tab 5 at 2-3. Both the appellant and the agency responded to the AJ's order, the agency moving to dismiss the appeal for lack of jurisdiction. *Id.*, Tabs 7-8.

¶3 The AJ dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing. ID at 1, 6. The AJ found that the appellant's statements that he was discriminated against based on his veteran's status were conclusory and unsupported. *Id.* at 6. Therefore, the AJ determined that the appellant failed to make non-frivolous allegations of fact that would establish a USERRA violation. *Id.*

¶4 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

¶5 USERRA provides in relevant part that “[a] person who . . . has performed . . . service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment . . . on the basis of that . . . performance of service.” [38 U.S.C. § 4311\(a\)](#). The statute further provides that an employer (including a federal agency) shall be considered to have engaged in a prohibited activity if the individual's military status is a motivating factor for one of the actions identified above, unless the employer can prove that the action would have been taken in the absence of the military status. [38 U.S.C. § 4311\(c\)\(1\)](#). An individual who believes that he has been the victim of a violation of section 4311(a) may file an appeal with the Board. 38 U.S.C. § 4324(b).

¶6 To establish Board jurisdiction over a USERRA discrimination appeal, an appellant must allege that: (1) He performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service.¹ *Dale v. Department of Veterans Affairs*, [102 M.S.P.R. 646](#), ¶ 14, *review dismissed*, 199 F. App'x 948 (Fed. Cir. 2006). A claim of discrimination under USERRA should be broadly and liberally construed in determining whether it is non-frivolous, particularly where, as here, the appellant is pro se. *Baney v. Department of Justice*, [109 M.S.P.R. 242](#), ¶ 14 (2008). Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has noted with approval the Board's "liberal approach in determining whether jurisdiction exists under USERRA." *Yates v. Merit Systems Protection Board*, [145 F.3d 1480](#), 1484 (Fed. Cir. 1998). The weakness of the assertions in support of a claim is not a basis to dismiss the USERRA appeal for lack of jurisdiction; rather, if the appellant fails to develop his contentions, his USERRA claim should be denied on the merits. *Randall v. Department of Justice*, [105 M.S.P.R. 524](#), ¶ 5 (2007). In addition, an appellant who raises a USERRA claim has an unconditional right to a hearing. *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007).

¶7 Here, the appellant has asserted, and the agency does not dispute, that he is a preference eligible disabled veteran. IAF, Tabs 1, 7. He further alleged that he

¹ The Board has found that an appellant's mere assertions that he is a veteran and he has been denied employment are not sufficient to raise a USERRA claim. See *McBride v. U.S. Postal Service*, [78 M.S.P.R. 411](#), 415 (1998) (the fact that the appellant's injury occurred while performing military service is incidental to her disability discrimination claim and does not bring the claim within USERRA's jurisdiction). An appellant must also allege that the agency refused to hire him based on his military service or his status as a veteran. See *Hammond v. Department of Veterans Affairs*, [98 M.S.P.R. 359](#), ¶ 8 (2005). In other words, an appellant must allege that the agency discriminated against him because of his prior military service or his current obligation to perform service.

previously worked for a component of the agency, the U.S. Census Bureau, as a crew leader for the 1990 decennial census and as a Field Operations Supervisor during the 2000 census. IAF, Tab 7. The appellant re-applied for a position for the 2010 census in August 2008, and he received notice from the agency on June 10, 2009, that he was no longer being considered for employment because a criminal background check in August 2008 resulted in a tentative match showing that he has an arrest record, he had been notified of the opportunity to respond to the background check in August 2008, and he had failed to respond within the 30-day window provided to him.² *Id.*; IAF, Tab 4, Subtab 2d. The appellant appealed alleging that he was denied employment because he is a disabled veteran and because he was part of a “group law suit for overtime in the 2000 census.” IAF, Tabs 1, 7. On review, the appellant asserts that the AJ erred in denying him his requested hearing and in denying him a telephone conference to clarify the issues in his appeal. PFR File, Tab 1.

¶8 The agency asserted below that the Census Bureau conducts standard criminal history background checks on all decennial census job applicants, and that its determination that it would not consider the appellant for a position was simply in accordance with its standard procedure when an applicant fails to meet the 30-day deadline for responding to a tentative match during the background check. IAF, Tab 8 at 2, 6. The agency contended that it did not discriminate

² The record shows that the appellant responded to the agency’s notice letter in February 2009. IAF, Tab 4, Subtab 2c. In his response, the appellant provided a copy of his State of California arrest record, which showed that the appellant was arrested and charged three times with a crime between 1981 and 1990, which was before his first period of employment with the agency. The first offense involved a hit and run automobile accident, where the appellant received a misdemeanor conviction and 12 months probation for leaving the scene of an incident involving property damage. The second arrest involved charges of disturbing the peace, exhibiting a firearm, and possession of a loaded rifle or shotgun in a vehicle. The record indicates “no disposition available” for this arrest. The final arrest involved a domestic abuse charge in which the appellant was convicted of a misdemeanor of inflicting corporal injury on spouse or cohabitant, and again received a sentence of probation. *Id.*

against the appellant based upon his prior uniformed service. *Id.* at 6. The agency further asserted that its Census Hiring and Employment Check staff, which determined that the appellant would no longer be considered for employment, is only given enough information about applicants to perform the background check. Therefore, they would have been unaware of the appellant's past uniformed service. *Id.* The agency, thus, argued that the appellant cannot make a non-frivolous allegation that his uniformed service was a substantial or motivating factor in its determination to deny him employment. *Id.* at 7.

¶9 We find that the appellant established jurisdiction over his USERRA appeal. Specifically, he has made a non-frivolous allegation that he performed duty in a uniform service of the United States, that the agency was aware of his prior uniformed service, and that it denied him employment in a temporary decennial census position. In addition, he has made a non-frivolous allegation that the agency denied his application to be re-employed in a position that he previously held, in part, because of his prior uniformed service. This is sufficient to constitute a nonfrivolous allegation of a USERRA violation. *See Williams v. Department of the Army*, [109 M.S.P.R. 206](#), ¶ 5 (2008). With regard to the agency's arguments below regarding the weakness of the appellant's assertions in support of his USERRA claim, these are matters which should be decided on the merits and are not the basis to dismiss the USERRA appeal for lack of jurisdiction. *Randall*, [105 M.S.P.R. 524](#), ¶ 5.

¶10 Because jurisdiction has been established, on remand, the appellant must prove by preponderant evidence that his military status was at least a motivating or substantial factor in the agency's decision to deny him employment. *See Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1013 (Fed. Cir. 2001). The appellant may meet this burden by using direct or indirect evidence. *Id.* at 1014. Discriminatory motivation under USERRA may be reasonably inferred from such circumstantial evidence as temporal proximity between the appellant's military activity and the adverse employment action, "inconsistencies between the

proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the [individual's] military activity, and disparate treatment of certain [individuals] compared to other [individuals] with similar work records or offenses.” *Id.* If the appellant meets his burden, the burden shifts to the agency to prove that legitimate reasons, standing alone, would have induced it to take the same action. *Id.*

ORDER

¶11 Accordingly, we remand this appeal to the regional office for further adjudication consistent with this Opinion and Order. The AJ shall provide the appellant with a hearing on his USERRA claim and issue a new ID on the merits of that claim.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.